IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5935

RICKEY LEE DURST, *ET AL.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF PETITIONERS

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OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland, affirming the fines and restitution ordered by the United States Magistrates, was unpublished. The opinion is *United States v. Durst* (No. N-75-0828), *Blystone* (No. N-76-0123), *Pinnick* (No. N-76-0213), *Rice* (No. N-76-0226), and *Flakes* (No. N-76-0312). (A. 27). The cases were joined together by the District Court, and decided by Chief Judge Edward S. Northrop on June 25, 1976. The decision of the District Court was affirmed by the United States Court of Appeals for the Fourth Circuit in an unpublished opinion on December 9, 1976. *United States v. Durst, et al.*, (No. 76-1905) (*per curiam*). (A. 44).

Jurisdiction

The jurisdiction of this Court is invoked under 28 United States Code, Section 1254(1). The Petition for a Writ of Certiorari was filed on December 27, 1976, within the time limit required by Rule 22.2 of the Rules of the Supreme Court.

Statutory Provision Involved

18 United States Code, Section 5010. Sentence.

"(a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation."

Question Presented for Review

May a fine or requirement of restitution be imposed on a defendant sentenced under the provisions of the Federal Youth Corrections Act, 18 U.S.C. §5010(a)?

Statement of the Case

Rickey Lee Durst

Defendant Durst was charged in a two-count indictment, charging violations of 18 U.S.C. § §1708 and 495. (A. 5-6). On December 5, 1975, Defendant entered a plea of not guilty to both charges. On February 24, 1976, a superseding information charging a violation of 18 U.S.C. §1701 was filed. (A. 7). Defendant entered a plea of guilty to the charge on that same date. The Defendant waived a Presentence Report and was sentenced to six months imprisonment, sentence suspended and placed on probation for a period of three years pursuant to the Federal Youth

Corrections Act, 18 U.S.C. §5010(a). As a condition of probation, Defendant was ordered to pay restitution in the amount of $160.00 and a fine of $100.00. (A. 8). Defendant noted an appeal to the United States District Court for the District of Maryland on February 24, 1976.

On December 22, 1976, Defendant Durst appeared before Magistrate Rosenberg on an alleged violation of probation. A violation was found, probation revoked, and a three month term of imprisonment as an adult was imposed. A "no benefit" finding was made. Defendant was released from custody on February 26, 1977.

Ronald Henry Blystone, Jr.

Defendant Blystone was charged with a violation of 18 U.S.C. §661 and 2, theft of property from a government reservation with a value of less than $100.00. (A. 10-11). Defendant entered a plea of guilty to the charge on February 24, 1976 and was sentenced by Magistrate Rosenberg to two years probation under the Federal Youth Corrections Act, 18 U.S.C. §5010(a), and as a condition of probation was ordered to pay a fine in the amount of $100.00. (A. 12). Defendant noted an appeal to the District Court on February 25, 1976.

Anthony E. Pinnick

Defendant Pinnick was charged in a complaint with a violation of 18 U.S.C. §661, theft of goods from a federal reservation with a value of less than $100.00. (A. 14-15). On April 5, 1976, Defendant entered a plea of guilty before Magistrate Clarence E. Goetz, was sentenced to a suspended sentence, and placed on probation for one year under 18 U.S.C. §5010(a) and fined $100.00 as a condition of probation. (A. 16). Defendant noted an appeal to the District Court.

James Albert Rice, II

Defendant Rice was charged in a three-count indictment alleging violations of 18 U.S.C. § §1708, 1701 and 495. (A. 19-20). On June 2, 1976, Defendant entered a plea of guilty to the 18 U.S.C. §1701 charge. Magistrate Rosenberg suspended a six month jail sentence and placed Defendant on probation for two years under the terms of 18 U.S.C. §5010(a) as made applicable to Defendant under 18 U.S.C. §4216. A fine of $100.00 was imposed as a condition of probation. (A. 21). An appeal to the District Court was noted.

Byron D. Flakes

Defendant Flakes was charged in a complaint with a violation of 18 U.S.C. §641, theft of public money in an amount less than $100.00. (A. 24-25). Defendant entered a plea of guilty before Magistrate Rosenberg on May 26, 1976. Imposition of sentence as to imprisonment was suspended and Defendant was placed on probation for one year under 18 U.S.C. §5010(a). As a condition of probation, Defendant was ordered to pay a fine in the amount of $50.00. (A. 26). An appeal to the District Court was noted.

As To All Defendants

The appeal of each defendant was consolidated by the United States District Court, which affirmed each sentence on June 25, 1976. (A. 27-42). On December 9, 1976, the United States Court of Appeals for the Fourth Circuit affirmed the decision of the District Court, citing its recent decision in *United States v. Oliver,* 546 F.2d 1096 (4th Cir. 1976). (A. 43-45). A Petition for a Writ of Certiorari was filed in the United States Supreme Court on December 27, 1976. The Petition was granted on March 21, 1977.

SUMMARY OF ARGUMENT

These cases present an issue of statutory construction for the Court. Petitioners submit that the sentencing alternatives provided by the Federal Youth Corrections Act, 18 U.S.C. §5010(a)-(d) are exclusive of the sentencing provisions of any other statute as well as of each other. *Cramer v. Wise,* 501 F.2d 959 (5th Cir. 1974). As such, reference to the substantive statute under which the youth offender is found guilty for purposes of imposing a fine is improper.

The imposition of a sentence under the Federal Youth Corrections Act envisions rehabilitative treatment for the offender rather than retributive punishment. *United States v. Mollet,* 510 F.2d 625 (9th Cir. 1975); *United States v. Hayes,* 474 F.2d 965 (9th Cir. 1973). The imposition of a punitive fine is inconsistent with the rehabilitative intent of the Act. *United States v. Hix,* 545 F.2d 1247 (9th Cir. 1976).

Although no Federal Court of Appeals presently takes the position that a requirement of restitution is not permitted by the Act, Petitioners submit that to permit restitution would allow sentencing courts to, in effect, impose a fine. This could well frustrate the intent of Congress with regard to the scope of the penalty provisions of the Federal Youth Corrections Act. Further, since the Act is an exclusive sentencing provision, any sentence over and above the alternatives clearly set out in the statute is improper.

ARGUMENT

I.

A FINE OR REQUIREMENT OF RESTITUTION MAY NOT BE IMPOSED ON A DEFENDANT SENTENCED UNDER THE PROVISIONS OF THE FEDERAL YOUTH CORRECTIONS ACT, 18 U.S.C. §5010(a).

It is the position of the Defendants that no fine or requirement of restitution may be imposed on a person sentenced under the provisions of the Federal Youth Corrections Act, 18 U.S.C. §5010(a). Defendants respectfully urge that the District Court and Fourth Circuit Court of Appeals erred in their affirmances of the imposition of said fines and restitution by the Magistrates. In its opinion, the District Court held that the imposition of fines and restitution could be consistent with the rehabilitative intent of the Act and that to inhibit the power of the sentencing judge to impose a fine might deny the benefits of the Act to otherwise qualified young offenders. *United States v. Durst, et al.*, (Nos. N-75-0828, N-76-0123, N-76-0213, N-76-0226, N-76-0312) (June 25, 1976) (Slip Op. at 11-13). The decision of the District Court was affirmed by the United States Court of Appeals for the Vourth Circuit, *United States v. Durst, et al*, (No. 75-1905) (4th Cir., December 9, 1975) (*per curiam*).

The Fourth Circuit, in holding that fines are not prohibited by the imposition of sentence under the Federal Youth Corrections Act in *United States v. Oliver*, 546 F.2d 1096 (4th Cir. 1976), found persuasive a change by Congress of the language in the original draft of the Act from "in lieu of penalty otherwise provided by law" to "in lieu of penalty of imprisonment" in 18 U.S.C. §5010(b). The Court read this change in conjunction with 18 U.S.C. §5023, which provides that nothing in the Act shall be "construed in any wise to amend, repeal, or affect the provisions of [§3651 et seq.]." *Oliver* at 1099. The Court also held that the power to impose a fine would promote the flexibility in sentencing intended by the Act. *Accord*, *United States v. Prianos*, 403 F. Supp. 766 (N.D. Ill. 1975).

Defendants respectfully contend that the decision of the Fourth Circuit is erroneous for a simple yet compelling reason. This reason is that the sentencing alternatives of the Federal Youth Corrections Act act as a substitute for the penalties set out in the statute under which the defendant is found guilty. It is apparent that the change in language in 18 U.S.C. §5010(b) was not intended to permit imposition of a fine, but merely to make absolutely clear that imprisonment of one found to be a Youth Offender was not permissible. The Court should read 5010(b) in its entirety:

> "(b) If the court shall find that a convicted person is a youth offender, *and the offense is punishable by imprisonment under applicable provisions of law other than this subsection*, the court may in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017(c) of this chapter;" (Emphasis added).

Since the penalties relative to both imprisonment and fines are supplanted by the use of the Act, and no provision is made for a fine within the sentencing scheme of the Act, no authority to impose a fine or restitution exists when the Act is applied. It should be noted that the Act has been "accurately described as the most comprehensive federal statute concerned with sentencing." *Dorszynski v. United States*, 418 U.S. at 432 (1973). It would have been a very simple matter for Congress to add language which would clearly provide for the imposition of a fine or restitution up to the amount provided for in the statute under which a youth offender could have been sentenced, if Congress had so intended. Although the general probation statute, 18 U.S.C. §3651, permits the imposition of a fine in conjunction with a probation sentence, the fine can only be imposed when the statute under which the defendant is sentenced specifically provides for a fine. Since the Federal Youth Corrections Act makes no such specific provision, a fine is impermissible when an offender is sentenced under its provisions. It is axiomatic that

doubts concerning the punishment fixed by Congress for a federal offense must be resolved in favor of the defendant. *United States v. Bass*, 404 U.S. 336, 348 (1971); *Bell v. United States*, 349 U.S. 81, 84 (1955).

An analogous situation to the question posed in these cases would result if an individual was convicted of an offense in violation of 18 U.S.C. §2111. The penalty for such a violation, as set out in the statute, is imprisonment for not more than fifteen years. No provision for a fine exists under the statute. Of course, the sentencing judge could place the offender on probation as provided for by 18 U.S.C. §3651. While the probation statute permits a fine as a condition of probation, the substantive statute under which the offender is sentenced does not. Thus, a fine could not be imposed. Defendants submit that the same holds true for the Federal Youth Corrections Act.

In a recent case before the United States District Court for the District of Maryland, it was held that, when a defendant is sentenced under 18 U.S.C. §5010(b), after a plea of guilty to a violation of 21 U.S.C. §841(b)(1)(B), an offense which *requires* a special parole term of two years, that the special parole term could not be imposed because it did not apply to one sentenced as a youth offender. Defendant in that case was sentenced under the provisions of 18 U.S.C. §4209, the Young Adult Offenders Act. *United States v. Coleman*, 414 F. Supp. 961 (D. Md. 1976). The District Court found that the Federal Youth Corrections Act was an alternative sentencing provision. The Court went on to state: "Courts of Appeal have generally held that a defendant who is sentenced under the provisions of the Youth Corrections Act or the Young Adult Offenders Act is not subject to the imposition of the panoply of punishments generally prescribed for adults convicted of the specific offense for which the sentence is imposed." *Id.* at 963, citing, among other cases, *United States v. Waters*, 437 F.2d 722 (D.C. Cir. 1970); *United States v. Hayes*, 474 F.2d 965 (9th Cir. 1973); *United States v. Bowens*, 514 F.2d 440 (9th Cir. 1975); *Cramer v. Wise*, 501 F.2d 959 (5th Cir. 1974).

In *United States v. Bowens*, 514 F.2d 440 (9th Cir. 1975), the defendant entered a plea of guilty to embezzlement of bank funds in the amount of less than $100.00 in violation of 18 U.S.C. §641. At the time of her plea, the defendant was 18 years of age and was sentenced to one year probation under and pursuant to 18 U.S.C. §5010(a) conditioned upon restitution in full and payment of a $200.00 fine. After the defendant had completed two months of her probation, the Magistrate set aside the original sentence and resentenced the defendant to one year probation and a fine of $200.00 under 18 U.S.C. §5010 (d) and 18 U.S.C. §3651, stating as his reason that it was his policy to exact fines from persons who have gained monetarily from illegal acts so as to teach them a lesson. On appeal from the Magistrate's sentence, the matter was remanded with directions that the Magistrate specifically find whether or not defendant would benefit from the application of the Youth Act. On remand, the Magistrate found that the defendant would benefit under the Act, but only if a fine could be imposed, and that if it could not be imposed, she should be sentenced as an adult. *Id.* at 441. The case was then returned to the District Court, which affirmed the sentence of probation and fine as previously imposed by the Magistrate. The Ninth Circuit specifically posed the question of whether a Court may impose probation pursuant to Section 5010(a) conditioned upon restitution of embezzled funds and the payment of a fine and answered that question in the negative.

In so holding, the *Bowens* Court cited the case of *United States v. Mollet*, 510 F.2d 625 (9th Cir. 1975). In this case, the Defendant Mollet, age 22, was fined $1,000.00 and placed on five years probation under the provisions of 18 U.S.C. §5010(a). A like sentence was imposed on co-defendant Moxley. Citing *United States v. Hayes*, 474 F.2d 965 (9th Cir. 1973), the *Mollet* Court held that punitive fines are inconsistent with the rehabilitative theory and provisions of the Youth Corrections Act. *Mollet* at 626.

In *United States v. Hayes*, the defendants were sentenced under the provisions of 18 U.S.C. §5010(b) for treatment and supervision. The Court also imposed a fine of $2,000.00 on

defendant Hayes and $1,000.00 on defendant Meicke. The *Hayes* Court held that the Youth Corrections Act did not provide for a fine when the youth offender is committed under the Act. In so holding, the Court stated:

> "...The Federal Youth Corrections Act is an alternative sentencing provision. At the discretion of the Judge, the youth offender deemed treatable under the Act can be sentenced to treatment rather than punishment under the applicable penalty provided by law. A combination of rehabilitative treatment and retributive punishment is not intended and is improper." *Id.* at 967.

The *Hayes* Court also makes reference to the case of *United States v. Waters*, 437 F.2d 722 (D.C. Cir. 1970), a case which points to the report of the House Committee that recommended the passage of the Youth Corrections Act: "The underlying theory of the [Act] is to substitute the retributive punishment methods of training and treatment designed to correct and prevent antisocial tendencies. It departs from the mere punitive idea of dealing with criminals and looks primarily to the objective idea of rehabilitation." H.R. Rep. No. 2979, 81st Cong., 2nd Sess., 2 U.S.C. Cong. Serv. pp. 3983, 3985. (1950).

Further support for this position is found in the case of *Cramer v. Wise*, 501 F.2d 959, 962 (5th Cir. 1974), which considered the validity of a fine imposed in connection with the commitment of a youth offender for treatment under the Youth Corrections Act, 18 U.S.C. §5010(b).

In *Cramer*, the Court stated:

> "We are of the opinion...that judges utilizing the Youth Corrections Act are limited to the options specified in the Act, and that fines may not be imposed on individuals sentenced under the Act. Initially, the clearly punitive fine imposed here is inconsistent with the expressed rehabilitative purposes of the Act. Secondly, a closer reading of the statute itself refutes the result reached by the lower court. Provisions of 18 U.S.C. §5010(a), (b), (c) and (d) are progressive in nature and exclusive of each other. It would deem illogical to conclude that detailed provisions, so obviously exclusive of each other, are not also exclusive of provisions not contained within the Act which the Act was designed to supplant."

While most cases dealing with the propriety of the imposition of a fine or the requirement of restitution deal with the provisions of 18 U.S.C. §5010(b), recent case law demonstrates that imposition of such conditions under 18 U.S.C. §5010(a) is likewise in excess of the permissible limits of the Youth Corrections Act. *Mollet, supra* and *Bowens, supra.* Thus, the imposition of a fine and the order of restitution by the Magistrates in the cases at bar is in excess of the punishment permitted by the statute.

As to the issue of the propriety of the requirement of restitution imposed in the case of defendant Durst, it must be frankly conceded that the Ninth Circuit has recently concluded that restitution is permissible under the Federal Youth Corrections Act. *United States v. Hix*, 545 F.2d 1247 (9th Cir. 1976). The Court distinguished a fine from restitution due to the fact that a fine is inherently punitive in nature, while restitution is essentially rehabilitative. It is, however, a real concern that sentencing courts may use restitution as a vehicle to accomplish that which is not permitted by the statute. Further, since the Federal Youth Corrections Act is an exclusive sentencing statute, any sentence beyond the limits of the Act is improper.

It may be argued by the Government that the issue of restitution is moot in that defendant Durst has been found to be in violation of his probation, had probation revoked, and completed his term of imprisonment upon revocation. Defendant Durst sumits his case is not moot because the sentence imposed could have detrimental consequences to defendant Durst in the future should he be sentenced upon a criminal conviction. A sentencing judge might well not consider a fine or restitution if Durst had been properly ordered to pay restitution in a previous case. Further, it is undisputable that a Motion to Correct an Illegal Sentence, which is the essence of this appeal, is cognizable at any time. Federal Rules of Criminal Procedure, Rule 35, *Byrnes v. United States*, 408 F.2d 599 (9th Cir.), *cert. denied*, 395 U.S. 986 (1969).

CONCLUSION

For the reasons stated in this brief, Petitioners respectfully pray this Honorable Court vacate the sentences imposed by the United States Magistrate in each case, and remand for re-sentencing with directions to strike from each sentence the requirement of payment of the fine and, in the case of defendant Durst, restitution. It is further prayed that this Honorable Court enter an Order directing the Clerk of the United States District Court for the District of Maryland to reimburse all fines previously paid by Petitioners.

Respectfully submitted,

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